

**OPENING STATEMENT OF
PHILIP N. HOGEN
NOMINEE FOR CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION
BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE**

September 25, 2002

Kadoka, South Dakota is the gateway to the Badlands in western South Dakota. That's where I was born and raised. My mother and her parents were born on the Pine Ridge Indian Reservation, just south of Kadoka. They were members of the Oglala Sioux Tribe, as I am. Mom still lives in Kadoka. My Father was born just north of Kadoka on the homestead of his Norwegian parents. When I was born, my Father was serving as a B-24 bombardier in the European theater. When he returned from the war, my parents opened a hardware store in Kadoka, and I grew up working in that store, and on the ranch that includes my grandfather's original homestead. Today my sister and her husband run that hardware store in Kadoka, which has been operating for over 56 years. My brother and his family operate the ranch, parts of which have been in Hogen ownership for over 90 years..

I learned to pitch pennies on the sidewalk in front of the hardware store, when things were slow. My Mom and Dad taught me to play cribbage and rap rummy at an early age, and when I was in grade school I got a roulette set for Christmas, and soon committed the odds and the pay-out schedule to memory. It didn't take long to learn that it didn't take much of an edge for the house to win most of the money. My buddies taught me how to play poker, and part of what I earned at the hardware store paid the tuition for that education.

I graduated from high school in Kadoka, and went to Augustana College in Sioux Falls, SD, studying economics, and then went right into law school at the University of South Dakota. My wife Marty and I were married between college and law school. Marty's family is from the Black Hills, where her father was a hardrock miner in the Homestake Gold Mine, and her mother at one time or another cooked in every restaurant in Deadwood, South Dakota. Marty and I were blessed with parents who instilled strong values and a work ethic in their children.

When I got out of law school I joined a good country lawyer in Kennebec, SD, just south of the Lower Brule and Crow Creek Sioux Reservations, and our practice included the representation of those tribes. Thus, I got a quick introduction to tribal government, tribal politics, and the overwhelming economic and social challenges facing Indian tribes. I witnessed first hand fruitless efforts to bring economic development, and the employment, wealth and dignity that comes with it, to Indian Country.

Jim Abdnor was from Kennebec, and in 1972 he was elected to Congress. Although I'd never been to Washington, DC, he asked me to serve as his Administrative Assistant, and I was proud to do

so, and I served with him through the 93d Congress.. We were a green team, and just as we were learning the ropes in Congress, the American Indian Movement took over Wounded Knee on the Pine Ridge Reservation, in our district, and before that 73-day occupation was over, I was on a first-name basis with just about everybody in the BIA and the Justice Department. While on Congressman Abdnor's staff I learned something about how Congress and Washington work. A focus of my work there was the needs of South Dakota's nine Indian Tribes. That Congress enacted the Indian Self-Determination and Education Assistance Act. The policy of termination was over, and the policy of Indian self-determination had begun.

When Congressman Abdnor was reelected in 1974, the only lawyer in Kadoka was elected to a judgeship, so I returned to Kadoka and became the States Attorney for a two-county area, which included the Northeast portion of the Pine Ridge Indian Reservation. Although this was a sparsely populated rural area, it included Interstate 90 and Badlands National Park, and as no alcohol was sold on the Reservation, but it was in the rest of the county, we had more than our share of barroom brawls and DWI cases. Thus, it was a very active criminal prosecution practice. I became active in the South Dakota States Attorneys Association, and eventually served as the organization's president, as well as serving on the Board of Directors of the National District Attorneys Association.

In 1981 the Reagan Administration was appointing new U.S. Attorneys, and with newly-elected Senator Jim Abdnor's help, I was appointed as the U.S. Attorney for South Dakota. Unfortunately, the thing that characterized the caseload of that office was the prosecution of crimes of violence on South Dakota's Indian Reservations, where there was Federal jurisdiction over major crimes. Nearly all of these crimes were substance-abuse related (mostly alcohol), and a large share of them were the result of domestic disputes. There is no doubt in my mind that the bleak poverty which prevailed on those reservations contributed significantly to that endemic violence there. During the ten years I served as South Dakota's U.S. Attorney I spent a great deal of time on Reservations meeting with tribal councils and tribal and BIA law enforcement, as well as trying a large number of the violent-crime cases, hoping to reverse the cycles of violence I saw there.

As U.S. Attorney, I first served on, and then chaired the Indian Affairs Subcommittee of the Attorney General's Advisory Committee of U.S. Attorneys. To begin with, this was only a handful of U.S. Attorneys whose districts' had Indian Major Crimes caseloads like mine--North Dakota, Montana, Minnesota, New Mexico and Arizona. We had a challenge attracting much of the Department of Justice's attention or resources. Then in the late '80's, Indian gaming started to spring up in a number of places, and U.S. Attorneys were discovering Indians they didn't know they had. They came to our subcommittee seeking guidance about what to "do" about Indian gaming. We didn't have a very good answer, as the law in this regard was just developing. We watched with interest as the Supreme Court decided the Cabazon case in 1987, and offered our views as Congress considered and enacted the Indian Gaming Regulatory Act (IGRA) in 1988. The rules were then in place for what became the only economic engine to bring successful economic development to Indian Country on a broad basis--Indian gaming.

While serving as chair of that Indian Affairs Subcommittee I gained a national perspective on the development of this industry, the implementation of IGRA, and participated in some of the early litigation which interpreted aspects of the then new act's application. These cases dealt with issues such as the Act's card game "grandfather clause", and differences between Bingo and Keno. The industry was beginning its evolution from a few large-stakes bingo games to the multi-billion dollar business it is today.

In 1992 I left the U.S. Attorney's Office and the Department of Justice, and accepted Secretary Manuel Lujan's invitation to become the first Director of the Office of American Indian Trust. The initial task there was to get the office open and organized. That effort was just under way when the Clinton Administration and its team took over that task. I then returned to South Dakota to practice law in early 1993.

From my law office in Rapid City, SD, I focused on the practice of Indian law, appearing in most of the tribal courts in the state. Two of the major projects I undertook at that time were the representation of the Standing Rock Sioux Tribe's Tribal Gaming Commission, and the representation of my own tribe—the Oglala Sioux Tribe—as they undertook Class III gaming on the Pine Ridge Reservation. The Oglala project was a comprehensive effort, including the drafting and adoption of a Tribal Gaming Ordinance, the negotiation of a Tribal-State Class III compact with the State of South Dakota and securing its approval by the Secretary of the Interior, the negotiation and submission of a Management Contract to the National Indian Gaming Commission, the drafting and adoption of Tribal Gaming Regulations, the selection and training of the Tribal Gaming Commission and its staff, as well as the construction and opening of the Prairie Winds Casino. This exercise familiarized me with all aspects of tribal gaming, and the challenges and opportunities presented in such efforts.

In 1995 I was asked by Secretary of the Interior Bruce Babbitt to serve as an Associate Member of the National Indian Gaming Commission. I accepted that offer, and took my oath of office from Secretary Babbitt on December 10, 1995.

I remained on the Commission until June of 1999. During the three-and-one-half years I served there three Chairmen and a Chairwoman, and two Vice-Chairmen (including myself) presided over the Commission. Those were years of dramatic growth in the Indian Gaming industry, and years in which the Commission struggled to stay abreast of the dynamic changes in the industry and its expansion.

My service on the Commission gave me a ring-side seat to observe the development and dynamics of this industry. One of its most dramatic features is its diversity. This diversity, of course, parallels the diversity of the Indian Nations. While gaming has been a very successful tool for tribal economic development, it is worth noting that only about half the tribes have been able to, or have chosen to utilize it as a means of improving economic conditions on their reservations. And while

gaming has been fabulously successful for a handful of the tribes that have chosen to utilize it, there is no direct correlation between the needs of the tribes and their ability to develop gaming businesses and employment on their reservations. Tribes' cultural traditions, their experience in the business world, the developers with whom they may have chosen to partner with in their undertakings, the gaming laws of the States in which their homelands are located, the competition for gaming dollars in their area, and to a very large extent, the market available to them all influence how successful particular tribes' efforts in the gaming industry may become.

Rural tribes in sparsely populated areas will likely never solve all their economic problems with tribal casinos. As long as they keep up with their competition, tribes located near large metropolitan markets will likely address most of their economic challenges with well-run gaming enterprises. Most of those in this latter category are wisely diversifying their economic bases, funding those efforts with their current gaming profits. Historically, gaming "booms" in the United States have been cyclical, and it would not be surprising to see the current national interest in gaming wane in years to come.

But large or small, full-scale casinos or week-end bingo operations in Indian Country will only be successful if they are run in a squeaky-clean fashion, and if the perceptions of those operations are that they are well and fairly regulated. The first place that all tribal gaming operations must adequately fund and manage their gaming efforts is in the regulation and oversight of those operations. If they can't afford to have a first-class regulatory structure and operation, they can't afford to get involved in gaming. Tribal gaming as it exists today, having its Genesis in the 1980s, has had the benefit of building on the regulatory experiences of the States, particularly that of the State of Nevada. While Nevada learned how to regulate gaming the hard way, Tribes have had the luxury of starting with the auditing, surveillance and other tools which took decades to develop in Nevada. Further, technology, including computerized accounting systems, presently permit greater scrutiny of gaming operations than was ever available in the earlier days of commercial gaming.

While the structure created by the Indian Gaming Regulatory Act still has many critics in the Indian Community, the role of the National Indian Gaming Commission, in my view, has significantly contributed to the confidence which the public places in Tribal gaming operations. While it's true that many States conduct and regulate their own State lotteries without any outside oversight, most casino gaming and bingo operations in State environments are privately operated, and have outside State regulation and oversight. I think that adds to the confidence the public places in those operations. Similarly, while the first-line of defense, so to speak, with respect to Tribal gaming operations is the regulation of the Tribes themselves, the fact that NIGC is providing oversight and establishes standards which must be met and reports which must be filed, provides a needed objectivity which justifiably instills public confidence in those operations, and contributes to the success and patronage of those operations.

I feel that there ought to be a good relationship between the regulating agency and the community which it regulates, but each should guard against there becoming too close a relationship.

As my drill instructor told my unit when we were in basic training: “he would be our friend, not our buddy;” I think this described the relationship which should exist between NIGC and the gaming tribes. There should be a dynamic tension between the regulator and the industry it regulates, but both sides should work to make the relationship a positive one. Regulators should see that rules are reasonable and easily understood. When it comes to enforcement, the regulator should be fair and firm, but should use common sense in the application of those rules, and avoid hyper-technical interpretations when regulations are applied to real-life situations.

By Federal standards, when I joined NIGC in 1995, it was an agency in its infancy. Although it was authorized with the passage of IGRA in 1988, it actually was not until 1991 that the first Commissioners were named, and in the months and years that followed those initial appointments, much of work done there was organizational and administrative in nature, getting the new agency started up, hiring staff, and drafting the agencies first regulations.

When I arrived at the Commission I spent a considerable amount of time studying other Federal regulatory structures, as diverse as the Postal Rate Commission and the Federal Trade Commission seeking models for an efficient and use-friendly organization. Among what I view to be significant accomplishments of NIGC while I had the privilege as serving there as an Associate Commissioner and Vice-Chairman from 1995 through mid-1999, were the adoption of the agency’s first Staff Manual, and the establishment of structured position descriptions and pay-scales and personnel policies for the Commission’s staff. This period also saw the adoption of the agency’s National Environmental Policy Act (NEPA) Manual, the revision of the funding structure which permitted the Commission to expand its efforts in an attempt to keep up with the growth of the regulated community, the opening of field offices and the hiring of additional staff, including a professional auditing team, and the adoption of Minimum Internal Control Standards (MICS) for the industry.

The development and implementation of the MICS were a challenging undertaking, and they were adopted in the face of some Tribal objections. The concept, of course, was not original with the Commission, and the standards eventually adopted were built largely on the model the tribes themselves developed. The changes in the regulation of tribal gaming brought on by the MICS were minimal in many of the well-run, well-regulated tribal operations. Elsewhere, however, I am convinced that they greatly enhanced tribal operations and regulation, and in many cases, saved tribal operations dollars they didn’t know they were losing. I think in the long run, this will be seen to have been a benchmark development in the field of tribal gaming regulation.

While on the Commission I spend a considerable amount of my time visiting tribal gaming operations, and traveling with the field staff. I found this provided me with an understanding and grasp of the nature and diversity of Indian gaming which I am not sure could have been achieved any other way.

Many of the talented employees working at NIGC while I served there are still with the Agency, as are many of those I helped select as the agency grew. I am confident that if I am confirmed and appointed to chair the Commission I will be able to work well with the staff at NIGC, and that my re-orientation process there can be short.

As the Indian gaming industry continues to experience significant growth, I expect that the Federal agency responsible for its oversight must not be permitted to fall behind. I know that the agency must continue to find better and more efficient ways to provide that oversight, but I also expect that given the extent and nature of task, more resources may well be required. I would hope that in this connection the industry and the Federal government would join in meeting those needs.

When I finished my duties with the Commission in 1999, I opened my law office in Rapid City, SD, and began an "Of Counsel" affiliation with the national law firm of Holland & Knight LLP, through their offices in Washington, DC. The focus of my practice was Indian law, and much of that work was in the gaming area. Partners in the Holland & Knight firm had developed long-term relations with a number of gaming tribes, and when those clients asked the firm to assist with the regulation of their gaming operations, I was often called upon. I helped several tribal clients update their tribal gaming regulations, and from time to time, provided training sessions for tribal gaming commissions and their staff. Some of the most exciting and interesting work I assisted with in my Of Counsel capacity with Holland & Knight was the development of gaming operations for tribes which were just entering the gaming field, including several operations in California. It was very rewarding to see those tribes find successful economic development, when often they had lacked such opportunities for decades.

My practice included other activities as well, and I again served as counsel for my own Tribe's gaming commission, the Oglala Sioux Tribal Gaming Commission. I also served as general counsel for the Tribe's institution for higher education, Oglala Lakota College.

Last Fall, Interior Secretary Gale Norton and Solicitor Bill Myers asked if I would join them as the Associate Solicitor for Indian Affairs, and I accepted that invitation, and began my present duties on October 25, 2001. Working with Assistant Secretary of Indian Affairs Neal McCaleb and the Bureau of Indian Affairs has been a most interesting and rewarding opportunity. The large and growing legal staff in the Division of Indian Affairs is a very busy and dedicated group, and it handles a very broad and diverse number of issues important to the Department of the Interior and individual Indians and Indian Tribes. Litigation focusing on the Department's fulfillment of its trust responsibility was one of the most significant areas our Division has been dealing with. I also had the privilege of serving on the Tribal Trust Reform Task Force which has been seeking better ways in which the Department can meet its trust obligations to Tribes and Indians. As the Associate Solicitor for Indian Affairs I provided counsel to the Secretary and the Assistant Secretary for Indian Affairs as Tribal-State Class III gaming compacts were reviewed, approved and rejected, and advised the Department in connection with its taking of lands into trust for Tribes for gaming and non-gaming purposes. I feel that this valuable experience will serve me well if I become the Chairman of the Commission, and will enhance the

coordination necessary between the Department, the Bureau of Indian Affairs, and NIGC.

I think that the work I have had the privilege to do will provide a good background from which to lead the National Indian Gaming Commission. I understand how important Indian gaming is to the many tribes now engaged in it, and I understand that thorough, fair regulation of that industry is critical to its continued success. I think relationships I have developed over the years within the Tribal community, within the gaming industry, and in State governments and in the Federal government can serve me well if called upon to keep the NIGC's oversight of tribal gaming strong, fair and efficient.

My wife Marty continues to teach Spanish in South Dakota's largest high school in Rapid City, and we have a lovely log home in the Black Hills. My daughter Vanya practices Indian law in Minneapolis, and my son Herb lives and works in Washington State. I have their support in connection with the challenge of this new position, and I am confident if this Committee and the Senate support my confirmation, and President Bush appoints me as the Chairman of the National Indian Gaming Commission, I can assure that the Commission fulfills its mission, and keeps the mandates of the Indian Gaming Regulatory Act.